

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Consumer.net, LLC	)	
and	)	
Russ Smith, an Individual,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. EB-05-TC-F-002
	)	
Verizon Communications, Inc., d/b/a	)	
Verizon Inc.,	)	
Verizon-New Jersey, Inc., d/b/a Verizon,	)	
Cellco Partnership & Affiliated Entities-	)	
CONSOLIDATED d/b/a Verizon Wireless,	)	
Bell Atlantic Communications, Inc., d/b/a	)	
Verizon Long Distance,	)	
Verizon Select Services, Inc.,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 31, 2010**

**Released: April 1, 2010**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this order, we grant one count, but deny all others, in a formal complaint filed by Consumer.net, LLC and Russ Smith (collectively “Complainants”) against the above-captioned Defendants<sup>1</sup> pursuant to section 208 of the Communications Act of 1934, as amended (“the Act”).<sup>2</sup> The Complainants have argued that Defendants violated the Commission’s do-not-call rules by purportedly making multiple prohibited telephone solicitations to Mr. Smith, and by failing to record properly his requests to be placed on the companies’ do-not-call lists. We find, however, that none of the calls at issue constituted “telephone solicitations” within the meaning of section 227 of the Communications Act, and thus we find no violation of the Act or our rules in connection with those calls. As to the allegations that the companies did not honor Mr. Smith’s requests to be placed on their do-not-call lists, we find that Verizon New Jersey did violate section 64.1200(e)(2)(iii) of the Commission’s rules and section 201(b) of the Act by failing to record a company-specific do-not-call request made by Smith in September 2003.

<sup>1</sup> Verizon New Jersey, Inc. (“Verizon New Jersey”), Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance Inc. (“Verizon Long Distance”), Verizon Select Services, Inc. (collectively “the Verizon Entities” or “Verizon”), and Cellco Partnership and Affiliated Entities CONSOLIDATED d/b/a Verizon Wireless (“Verizon Wireless”). Because we dismiss all counts in this proceeding against Verizon Communications, Inc. (“Verizon Communications”), we do not refer to Verizon Communications hereafter as one of the “Defendants.”

<sup>2</sup> 47 U.S.C. § 208.

We find insufficient evidence, however, to conclude that Verizon Wireless similarly failed to record a do-not-call request.

2. Complainants also raised a number of other allegations against the Defendants. We dismiss all counts against Verizon Communications because complaints under section 208 may be filed only against common carriers, and the record does not show that Verizon Communications is properly deemed such a carrier. With respect to the remaining allegations, we find no violations, as set forth below. Finally, we find insufficient evidence to justify Complainants' request for an award of damages for the one violation (failure to timely record a do-not-call request) that we find here.

## II. BACKGROUND

3. Complainants challenge whether the Defendants have adhered to their statutory and regulatory obligations concerning telephone solicitations and the maintenance of do-not-call lists.<sup>3</sup> The formal complaint follows a related, previously-filed informal complaint, and arises from Defendants' alleged failure to honor Smith's requests to be placed on Defendants' company-specific do-not-call list.<sup>4</sup> In their formal complaint, Complainants allege that Defendants violated sections 64.1200(e)(2)(v)<sup>5</sup> and 64.1200(d)(5) of the Commission's rules<sup>6</sup> and section 227 of the Act,<sup>7</sup> by failing to implement properly company-specific do-not-call requests; and that Defendants violated sections 64.1200(e)(2)(iii)<sup>8</sup> and 64.1200(d)(3) of the Commission's rules,<sup>9</sup> and section 227 of the Act,<sup>10</sup> by failing to implement company-specific do-not-call requests within a reasonable amount of time. Complainants also allege that Verizon Communications violated sections 201, 205, 225, 227, 251, 254, 258 and 416 of the Act<sup>11</sup> by failing to register in accordance with section 64.1195(c) of the Commission's rules while providing telecommunications service as a telecommunications carrier; and that Verizon New Jersey and Verizon Wireless violated section 64.1195(b)(1) of the Commission's rules,<sup>12</sup> and sections 201, 205, 225, 227,

<sup>3</sup> *Consumer.net LLC, et al. V. Verizon Communications, Inc., et al*, Complaint, File No. EB-05-TC-F-002 (Jan. 25, 2005)(« Complaint »).

<sup>4</sup> *Consumer.net LLC, et al. v. Verizon Communications, Inc, et al.*, Informal Complaint, IC No. 04-I0137661 (Sept. 7, 2004). We note that Complainants' formal complaint was timely filed within six months from the date of the Jan. 7, 2005 informal complaint carrier's report, so that the formal complaint filing is deemed to relate back to the filing date of the informal complaint. See 47 C.F.R. § 1.718. As a result, the limitations period under section 415(b) of the Act extends to two years before the filing of the informal complaint. 47 U.S.C. § 415(b).

<sup>5</sup> 47 C.F.R. § 64.1200(e)(2)(v); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC RCD 8752, 8766, ¶ 24 (1992) (1992 TCPA Order). We note that the Commission amended the TCPA rules in 2003, but did not change the language contained in section 64.1200(e)(2)(v). See *infra*, n. 8. Thus, the effective date for the section at issue remains December 20, 1992.

<sup>6</sup> 47 C.F.R. § 64.1200(d)(5).

<sup>7</sup> 47 U.S.C. § 227.

<sup>8</sup> 47 C.F.R. § 64.1200(e)(2)(iii); see also 1992 TCPA Order, 7 FCC RCD 8752, 8764, ¶ 21. We note that the Commission amended the TCPA rules in 2003 and amended section 64.1200(e)(2)(iii) of the Commission's rules to allow a carrier up to 30 days to honor a consumer's do-not-call request. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14069, ¶ 94 (2003) (2003 TCPA Order); see also 47 C.F.R. § 64.1200(d)(3).

<sup>9</sup> 47 C.F.R. § 64.1200(d)(3).

<sup>10</sup> 47 U.S.C. § 227.

<sup>11</sup> 47 U.S.C. §§ 201, 205, 225, 227, 251, 254, 258, 416.

<sup>12</sup> 47 C.F.R. § 64.1195(b)(1).

251, 254, 258, and 416 of the Act by filing false information on FCC Form 499-A while providing telecommunications service as a telecommunications carrier.<sup>13</sup>

4. Complainants allege that at various times, Smith subscribed to Verizon local service in different locations, and that he asked that his residential telephone number be placed on Verizon's internal do-not-call lists at each of those locations. The calls and requests relevant to this proceeding began in September 2003. Smith asserts that in September 2003, he moved to Ocean City, New Jersey, obtained local telephone service from Verizon New Jersey, and requested that his new residential telephone number be unpublished and placed on the company's internal do-not-call list.<sup>14</sup> Verizon states that Smith chose Verizon Long Distance Service at that time, but that he subsequently switched his long distance service to Sprint on November 5, 2003.<sup>15</sup>

5. Smith states that on or about June 29, 2004, he received an automated call from Verizon at his residential telephone number that he describes as promoting a plan that provided that long distance minutes would carry over from month-to-month. Smith notes that Sprint was his long distance carrier at that time.<sup>16</sup> Smith asserts that he contacted a Verizon New Jersey representative that same day, who informed him that his account had not been marked as do-not-call, and that the do-not-call policy was a part of a privacy pamphlet that would be sent to him via U.S. mail. Smith states that he never received the pamphlet. Smith asserts that he also sent letters to Verizon New Jersey and Verizon Communications requesting a copy of its internal do-not-call policy, and offering to accept a monetary payment to settle the matter. He states that he did not receive a response from the two Verizon entities.<sup>17</sup>

6. Smith contends that he received another telephone solicitation on or about September 6, 2004, when he received an artificial or prerecorded message that stated, "This is a Verizon Select..." before the line went dead.

7. Smith further asserts that on or about November 7, 2004, he attempted to place his Sprint cell phone number on both Verizon and Verizon Wireless's internal do-not-call lists via the Internet.<sup>18</sup> He states that the Verizon Wireless website instructed him to either write Verizon Wireless or call the customer service number listed to make his do-not-call request.<sup>19</sup> According to Smith, when he called customer service the same day, the customer service representative insisted that she could not take his request over the phone, and she gave him the telephone number for the National Do-Not-Call Registry administered by the federal government.

8. According to Smith, on or about November 17, 2004, he received another automated call from Verizon, similar to the one received on June 29, 2004. The entity identified in the call was Verizon Long Distance, and Smith alleges that the message promoted a plan that allowed minutes to carry over from month to month.<sup>20</sup>

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<sup>13</sup> Complaint at 5-6.

<sup>14</sup> *Id.*

<sup>15</sup> *Consumer.net, et al. v. Verizon Communications, Inc., et al.*, Response of Verizon and Verizon Wireless to the FCC's Request for Additional Information, EB-05-TC-F-002, (July 14, 2005) ("Defendants' Response to Staff's Request") at 5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Complaint at Ex. 3.

<sup>20</sup> Complaint at S.A.

9. Finally, Smith contends that on or about November 22, 2004, he received another automated message that mentioned Bell Atlantic before the line went dead. He alleges that this call, too, constituted a telephone solicitation.<sup>21</sup>

### III. DISCUSSION

10. It is well established that the Complainant has the burden of proof in a formal complaint proceeding under section 208 of the Act.<sup>22</sup> Thus, to prevail, a Complainant must demonstrate by a preponderance of the evidence that the alleged violation of the Act or the Commission's rules actually occurred.

#### A. The Alleged Telephone Solicitations

11. We address first Complainants' claim that Verizon Long Distance and Verizon Select made unlawful telephone solicitations, and find that none of the calls at issue constituted "telephone solicitations" under section 227(a)(3) of the Act.

##### 1. Verizon Long Distance's June 29, 2004, and November 17, 2004, calls did not constitute telephone solicitations.

12. Complainants assert that Smith received two unlawful telephone solicitations from Verizon Long Distance, one on June 29, 2004, and one on November 17, 2004. The message that Smith received in June was the following:<sup>23</sup>

Hello. This is Verizon Long Distance calling with a special reminder for valued customers like you. Don't forget that you'll receive 60 free domestic long distance minutes on Sunday, July Fourth. So whether you call Independence, Missouri, or Liberty, Texas, or Freedom, New York, you can celebrate on us and you don't have to do anything. These minutes will automatically be applied to your account. Just be sure to use them on the Fourth because they won't rollover. Thanks again for your business.

In November, he received a similar message:

This is Verizon Long Distance calling to remind you that you will receive 60 free domestic long distance minutes on Thanksgiving Day, Thursday, November 25<sup>th</sup>. These minutes will be automatically applied to your account. Just be sure to use them on the 25<sup>th</sup> because they won't rollover. It's our way of saying, 'Thanks for your business.

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<sup>21</sup> *Id.*

<sup>22</sup> See 47 U.S.C. § 208; see also *Directel, Inc. v. American Telephone and Telegraph Company*, Memorandum Opinion and Order, 11 FCC Rcd 7554, 7560-61, ¶ 14-15 (1996); *Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997); *Amendment of Rules Concerning Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 8 FCC Rcd 2614 (1993); *Connecticut Office of Consumer Counsel v. AT&T Communications*, Memorandum Opinion and Order, 4 FCC Rcd 8130 (1989), *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991). See generally 47 C.F.R. §§ 1.720-1.735.

<sup>23</sup> The parties agree that Smith subscribed to Sprint as his long distance carrier at the time he received these messages on his residential phone line.

While Complainants assert that these messages constitute telephone solicitations, Verizon states that the June 29 and November 17 offers that Smith received are typical of those periodically sent to current Verizon customers as a form of good will, and that Smith received those calls in error because his residential number had been held previously by a Verizon Long Distance customer.<sup>24</sup>

13. While we appreciate the annoying nature of these unwelcome calls, we must be governed by the language of the statute, and based on that language we find that neither of these messages constitutes a “telephone solicitation” within the meaning of section 227 of the Act. Section 227(a)(3) defines a “telephone solicitation” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”<sup>25</sup> Verizon denies that its purpose was to encourage the purchase of services, arguing that the messages at issue were intended to be sent only to *current* Verizon customers. The specific language used in the messages is consistent with that explanation. For instance, the June 24 message refers to “a special reminder for valued customers like you,” “your account,” and “[t]hanks again for your business,” language that appears to be directed to current Verizon Long Distance customers rather than the general public or potential new customers.<sup>26</sup> The November 17 message includes similar references to “calling to remind you,” “your account,” and “[i]t’s our way of saying, ‘Thanks for your business.’” Moreover, nothing in the messages expressly encourages the purchase of any services.<sup>27</sup> The fact that the messages contain no information about how to contact Verizon to take advantage of the offer further suggests that they were not intended as solicitations.

14. Taking into account Verizon’s statement as to its purpose in delivering the messages, the language used in those messages, and the lack of any evidence of an inappropriate pattern or practice of using such calls to solicit new customers, we find that Verizon’s assertion that it contacted Smith in error, intending only to communicate the offers to existing Verizon customers, is more likely than that Verizon’s messages were soliciting new customers.<sup>28</sup> We therefore find, based on the specific facts before us, that the June 29 and November 17, 2004 prerecorded messages are not telephone solicitations within the meaning of section 227(a)(3) of the Act because they were not “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services,”<sup>29</sup> and that Verizon Long Distance did not violate section 64.1200(a)(3) of the rules.

**2. Verizon Select’s September 6, 2004, call did not constitute a telephone solicitation.**

15. Complainants assert that on or around September 6, 2004, Smith received a call to his residential telephone number using a prerecorded or artificial voice that stated “This is a Verizon Select...,” before the line went dead.<sup>30</sup> While the message identifies the caller as Verizon Select, the

<sup>24</sup> Defendants’ Response to Staff’s Request at 5. Verizon further states that it takes Verizon’s systems longer to update non-marketing, non-sales lists as opposed to messages used as a part of a marketing or sales campaign that must be updated in accordance with federal and state requirements. *Id.*

<sup>25</sup> 47 U.S.C. § 227(a)(3) (emphasis added).

<sup>26</sup> See *supra* ¶ 12.

<sup>27</sup> A message purporting to be a free offer can, in some circumstances, constitute a telephone solicitation, but the Commission has noted that the “application of the prerecorded message rules should turn, not on the caller’s characterization of the call, but on the purpose of the message.” 2003 TCPA Order, 18 FCC Rcd at 14098, ¶ 141. As described above, we find that solicitation was not the purpose of the messages at issue.

<sup>28</sup> See *supra* ¶ 12.

<sup>29</sup> See *supra*, n. 25.

<sup>30</sup> Complaint at S.A.

message does not state the purpose of the call, nor whether any product or service was being advertised. Absent such information, Complainants have not proved that the September 6 call constitutes a “telephone solicitation” within the meaning of section 227(a)(3) of the Act.<sup>31</sup> As a result, we find that Verizon Select did not violate section 64.1200(d)(3) of the Commission’s rules with this call.<sup>32</sup>

## **B. Complainants’ Do-Not-Call Requests**

16. We find that Verizon New Jersey violated section 64.1200(e)(2)(iii) of the Commission’s rules<sup>33</sup> and section 201(b) of the Act<sup>34</sup> when it failed to place Smith’s residential telephone number on its company-specific do-not-call list. Complainants have failed, however, to meet their burden of proof under section 1.721 of the Commission’s rules to show that Verizon Wireless similarly violated section 64.1200(d)(3) of the Commission’s rules governing do-not-call requests, or section 201(b) of the Act.

### **1. Defendants violated the Commission’s rules by failing to record Smith’s company-specific do-not-call request in September 2003.**

17. The parties do not dispute that on or around September 17, 2003, Smith activated residential local service with Verizon New Jersey.<sup>35</sup> The parties disagree, however, as to when Smith requested that Verizon place him on its company-specific do-not-call list. Smith presents a sworn affidavit stating that he made that request at the time he obtained service in September 2003,<sup>36</sup> and also provides evidence that a Verizon customer service representative informed him on June 29, 2004, that his account had *not* been marked as do-not-call.<sup>37</sup> According to Verizon, however, its records indicate that Smith asked to be placed on the company-specific do-not-call list on or around June 29, 2004, and that Verizon New Jersey did so on July 1, 2004.<sup>38</sup> Verizon denies generally that it failed to honor any of Smith’s do-not-call requests in a timely fashion.<sup>39</sup>

18. Section 64.1200(e)(2)(iii) of the Commission’s rules requires telemarketers to “place the subscriber’s name and telephone number on the do-not-call list at the time the request is made.”<sup>40</sup> Thus, Verizon New Jersey should have placed Smith on its company-specific do-not-call list when he made his initial do-not-call request at issue in this case.<sup>41</sup> Smith has provided a sworn declaration stating that he

<sup>31</sup> Similarly, the November 22, 2004 call described in para. 9, *supra*, cannot be characterized as a “telephone solicitation” because virtually no information has been provided about the content of the call.

<sup>32</sup> Because Complainants have not shown that Defendants made unlawful telephone solicitations to Smith, we need not address the issue of how the do-not-call rules apply to affiliates of the entity to which the do-not-call request was made, *i.e.*, whether a request made to any Verizon entity, including Verizon Wireless, is binding as to all Verizon entities, including Verizon Wireless.

<sup>33</sup> *See supra*, n. 8.

<sup>34</sup> Section 201(b) of the Communications Act requires that all “charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is...unlawful.” 47 U.S.C. § 201(b).

<sup>35</sup> Complaint at S.A.; *Consumer.net, LLC, et al v. Verizon Communications, Inc., et al*, Answer, File No. EB-05-TC-F-0022, 14 (May 26, 2005) (“Answer”).

<sup>36</sup> Complaint at S.A.

<sup>37</sup> *Id.*

<sup>38</sup> Answer at Ex. 4.

<sup>39</sup> Answer at 5.

<sup>40</sup> *Id.*

<sup>41</sup> *See* 47 C.F.R. § 1.724(b) (stating that the answer shall advise the complainant and the Commission fully and completely of the nature of any defense).



made that request when he activated service in September 2003.<sup>42</sup> Verizon, however, does not specifically address Smith's claim of a September 2003 request, instead offering only a general denial that it failed to honor any of his requests in a timely fashion<sup>43</sup> and making no specific representation about whether Verizon records contain any notation regarding a September 2003 do-not-call request.<sup>44</sup> In particular, Verizon failed to demonstrate that they have accurate business records that show no request. Smith's very specific sworn claim regarding his September 2003 do-not-call request, when weighed against Verizon's failure to specifically address that alleged request, persuades us that Smith has demonstrated by a preponderance of the evidence that he requested that his account be placed on Verizon's company-specific do-not-call list on or around September 17, 2003. Inasmuch as Verizon states affirmatively that Smith was not placed on the do-not-call list until July 1, 2004, it is clear that they did not timely record a September 2003 do-not-call request.<sup>45</sup> We therefore conclude, based on the facts presented, that Verizon New Jersey violated section 64.1200(e)(2)(iii) of the Commission's rules<sup>46</sup> by failing to record Smith's company-specific do-not-call request on or around September 17, 2003. We further find that a failure to record Smith's company-specific do-not-call request as mentioned herein in accordance with section 64.1200(e)(2)(iii) of the Commission's rules constitutes both a violation of 64.1200(e)(2)(iii) and a violation of section 201(b) of the Act.

**2. Complainants Have Not Demonstrated That Verizon Wireless Failed to Record a November 7, 2004, Do-not-call Request.**

19. Complainants assert that on November 7, 2004, Smith attempted to place his Sprint cell phone number on Verizon Wireless's company-specific do-not-call list via the Internet.<sup>47</sup> According to Smith, the website instructed him to either call or write Verizon Wireless to make his request.<sup>48</sup> Smith asserts that he used the prescribed customer service telephone number that same day to contact Verizon Wireless, but that the customer service representative insisted that she could not take his do-not-call request over the phone. Instead, according to Smith, she provided him with a telephone number for the National Do-Not-Call Registry. Complainants assert that Verizon Wireless thereby violated section 64.1200(d)(3) of the Commission's rules by failing to record Smith's company-specific do-not-call request.<sup>49</sup> Defendants generally deny that they refused to record or honor any of Smith's do-not-call requests.<sup>50</sup>

20. We are not convinced, in the first instance, that Complainants met their initial burden under section 1.721(a)(5) of the Commission's rules to proffer sufficient evidence to demonstrate that Verizon Wireless in fact refused to record Smith's do-not-call request.<sup>51</sup> Given that a trained customer service representative referred Smith to the National Do-Not-Call Registry, it appears just as likely that this representative simply misunderstood Smith's request. We therefore find that Complainants failed to

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<sup>42</sup> Complaint at S.A.

<sup>43</sup> Answer at 5.

<sup>44</sup> Answer at Ex. 4.

<sup>45</sup> *Id.*

<sup>46</sup> 47 C.F.R. § 64.1200(e)(2)(iii), (current version, 47 C.F.R. § 64.1200(d)(3), amended Oct. 1, 2003).

<sup>47</sup> Complaint at S.A.

<sup>48</sup> Complaint at Ex. 3.

<sup>49</sup> See 47 C.F.R. § 64.1200(d)(3).

<sup>50</sup> See *supra*, n. 43.

<sup>51</sup> See 47 C.F.R. § 1.721(a)(5).

meet their burden of proof under section 1.721(a)(5) of the Commission's rules to show that Verizon Wireless violated section 64.1200(d)(3) of the Commission's rules.

**C. The Counts Against Verizon Communications, Inc.**

21. Complainants assert that Verizon Communications has violated section 64.1195(c) of the Commission's rules,<sup>52</sup> requiring interstate telecommunications carriers to register with the Commission, and sections 201, 205, 225, 227, 251, 254, 258 and 416 of the Act.<sup>53</sup> Complainants contend that the company operates not only as a holding company, but also as a telecommunications carrier. We find, however, that Complainants have failed to demonstrate by a preponderance of the evidence *on this record* that Verizon Communications is a common carrier. Accordingly, Verizon Communications is not subject to complaints under section 208, nor is it subject to the cited rule or statutory provisions. Therefore, we dismiss all counts against Verizon Communications.<sup>54</sup>

22. In order to be a "common carrier," Verizon Communications would have to offer telecommunications for a fee directly to the public.<sup>55</sup> Defendants state that Verizon Communications is not a telecommunications carrier, but rather a holding company that holds stock in its subsidiaries, which in turn operate as separate corporate entities.<sup>56</sup> Defendants further state that Verizon Communications does not conduct any other business and does not sell, market, or provide telecommunications services of any kind.<sup>57</sup> Complainants, by contrast, assert that Verizon Communications is actually selling telecommunications services directly to the public by collecting marketing lists from its telephone companies and selling combined or bundled services to the public that no individual Verizon entity could sell on its own.<sup>58</sup>

23. In support of that assertion, Complainants reference an affidavit from the marketing executive employed by a *different entity*, Verizon Services Corporation, that discusses how that entity (and not Verizon Communications) works with Verizon local service operating companies, long distance affiliates, and Verizon Online, to enable those Verizon entities to offer and market bundled services.<sup>59</sup> Complainants also reference an article in which an executive of Verizon Communications' Retail Markets speaks about Verizon service offerings in general,<sup>60</sup> but not to any specific alleged telecommunications

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<sup>52</sup> 47 C.F.R. § 64.1195(c).

<sup>53</sup> 47 U.S.C. §§ 201, 205, 225, 227, 251, 254, 258, 416.

<sup>54</sup> *Cf. Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008), where the Commission, likewise limiting its holding to the particular facts and the particular statutory provision at issue, determined that the entities involved in that case were properly deemed telecommunications carriers.

<sup>55</sup> *See National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (stating that common carrier status comprises a quasi-public character evidenced by a carrier's affirmative act to serve indifferently all potential users). The term "common carrier" is largely synonymous with the term "telecommunications carrier," as defined in the Act. The Act defines "telecommunications" as "the transmission, between or among points specified by the user of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). In turn, if "telecommunications" is offered for a fee directly to the public, the carrier is offering "telecommunications services" and is a "telecommunications carrier." *Id.* § 153(44).

<sup>56</sup> Answer at Ex. 6.

<sup>57</sup> *Id.*

<sup>58</sup> Complaint at 6.

<sup>59</sup> *Id.* at 6, Ex. 16.

<sup>60</sup> *Id.* at 6, Ex. 8.



carriage activity by Verizon Communications. We reject Complainants' assertion that Verizon Communications' use of the unified brand name and trademark "Verizon" is direct proof of telecommunications carriage.<sup>61</sup> Thus, on the whole, the evidence in the record does not establish that Verizon Communications itself provides telecommunications services, or that it is a telecommunications carrier. As a result, no claims against Verizon Communications are cognizable under section 208 based on the facts presented herein by the Complainants, and such claims are therefore dismissed.<sup>62</sup>

#### **D. Complainants' Allegations Against Verizon New Jersey and Verizon Wireless**

24. Complainants argue that Verizon New Jersey and Verizon Wireless violated section 64.1195(b)(1) of the Commission's rules<sup>63</sup> and sections 201, 205, 225, 227, 251, 254, 258, and 416 of the Act<sup>64</sup> by failing to register with the State of New Jersey the d/b/a names Verizon registered on FCC Form 499-A, namely "Verizon" and "Cellco Partnership and Affiliated Entities – CONSOLIDATED," respectively.<sup>65</sup> Because Verizon New Jersey and Verizon Wireless registered the aforementioned d/b/a names on FCC Form 499-A with the Commission, Smith argues that a similar registration should have been done with the states, respectively.<sup>66</sup> Complainants fail, however, to present persuasive legal arguments or documentation to convince us that this state issue violates the cited rule or statutory provisions.<sup>67</sup>

#### **IV. REQUESTS FOR RELIEF**

25. Complainants request that the Commission assess forfeitures against Verizon for violation of the Commission's rules and orders, issue an order requiring Defendants to discontinue all telephone solicitations in the United States until Defendants provide proof that they are in strict compliance with section 64.1200 of the Commission's rules, and order Verizon to pay damages in the amount of \$5,000, primarily for legal and administrative costs associated with pursuing their complaint.<sup>68</sup>

26. We deny Complainants' claim for damages. We find here only one violation, Verizon New Jersey's failure to promptly implement Smith's September 2003 request to place his telephone number on its company-specific do-not-call list. We note that Complainants have not demonstrated that any unlawful telephone solicitations resulted from that failure. Complainants request approximately \$5000 in damages, asserting that their damages are "the legal and administrative expenses of attempting to opt-out. The expenses are primarily the expenses associated with pursuing this complaint."<sup>69</sup> First, we note that the "expenses of attempting to opt-out" do not encompass all the expenses of pursuing this complaint. The evidence indicates that the one improperly handled do-not-call request was promptly

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<sup>61</sup> *Id.* at 7-8.

<sup>62</sup> Although under section 411 of the Act, 47 U.S.C. § 411, the Commission may permit the joinder of parties other than common carriers where those parties are "interested in or affected by the...practice under consideration," the pleadings here fail to implicate Verizon Communications in the practices set forth in the complaint. As a result, we find that the joinder of Verizon Communications as a party to this proceeding is not warranted under the facts of this case.

<sup>63</sup> *Id.* § 64.1195(b)(1).

<sup>64</sup> 47 U.S.C. §§ 201, 205, 225, 227, 251, 254, 258, 416.

<sup>65</sup> Complaint at 9.

<sup>66</sup> *Id.*

<sup>67</sup> *See* 47 C.F.R. § 1.720.

<sup>68</sup> Complaint at 19-20.

<sup>69</sup> Complaint at para. 40.

rectified when Smith repeated that request in June 2004.<sup>70</sup> Thus, Complainants have not provided the necessary information to prove damages as required by section 1.722(h) of the Commission's rules.<sup>71</sup> Moreover, we find that Complainants' legal and administrative costs incurred as a *pro se* litigant are analogous to attorney fees. Because the Act and the Commission's rules do not allow the Commission to award attorney fees or costs,<sup>72</sup> we decline to award such costs as damages here.

27. We also deny Complainant's request that we impose a forfeiture against Verizon. Sections 206-208 of the Act establish private remedies for parties aggrieved by carriers, while section 503(b) of the Act gives the Commission the discretion to assess forfeitures payable to the United States.<sup>73</sup> Accordingly, a formal complaint proceeding under sections 206-208 of the Act is not an appropriate venue for the Commission's imposition of forfeitures. If the Commission were to determine that Verizon's do-not-call practices warranted the issuance of a notice of apparent liability for forfeiture under section 503(b) of the Act, the Commission would impose such a penalty in a separate proceeding.<sup>74</sup>

28. Finally, we deny Complainants' request that we order Defendants to discontinue all telephone solicitations in the United States until Defendants provide proof that they are in compliance with section 64.1200 of the Commission's rules.<sup>75</sup> We find here only a single violation of our rules, a one-time failure to promptly implement a do-not-call request. Complainants have not shown widespread violations or the potential for future misconduct or harm necessary to warrant the relief they seek.

## V. OTHER MATTERS

29. Complainants filed a letter requesting clarification on 11 issues in the instant proceeding, a motion to strike, and a motion requesting the Commission's adjudication of this complaint.<sup>76</sup> We find that the resolution of this proceeding as stated herein renders those filings moot, and we therefore deny each of them.

30. As to Defendants' confidentiality claim under section 1.731 of the Commission's rules for certain documents that Defendants filed in Response to Complainants First and Second Set of Interrogatories,<sup>77</sup> we are persuaded that the documents relating to brand names and trademarks in Exhibits A-C of Defendants' response meet the disclosure exemption under 5 U.S.C. § 552(b)(4) of the Freedom

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<sup>70</sup> See para. 17, *supra*, indicating that Smith repeated his request on June 29, 2004, and that his number was placed on Verizon's do-not-call list on July 1, 2004.

<sup>71</sup> See Complaint at 20, S.A.

<sup>72</sup> See *Ascom Communications, Inc. v. Sprint Communications Co., L.P.*, 15 FCC Rcd 3236 (2000); *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, 11 FCC Rcd 11202, 11208 (1996); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC2d 1244, 1259 (1985).

<sup>73</sup> 47 U.S.C. §§ 208, 503(b); 47 C.F.R. § 1.80(e).

<sup>74</sup> See *Halprin v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22581, at ¶ 29 (1998).

<sup>75</sup> We note that "Defendants" does not include Verizon Communications. See *supra* ¶ 21.

<sup>76</sup> See Letter from Russ Smith to David Hunt, Senior Attorney, Telecommunications Consumers Division, Enforcement Bureau (April 15, 2005); see also *Consumer.net LLC, et al. v. Verizon Communications, Inc., et al.*, Motion to Strike, File No. EB-05-TC-F-002 (June 23, 2005); see also, *Consumer.net LLC, et al. v. Verizon Communications, Inc., et al.*, Motion to Request Commission's Adjudication, File No. EB-05-TC-F-002 (Feb. 2, 2007).

<sup>77</sup> *Consumer.net LLC, et al. v. Verizon Communications, Inc., et al.*, Responses of Verizon and Verizon Wireless to Complainant Russ Smith's First and Second Set of Interrogatories, File No. EB-05-TC-F-002 (July 14, 2005).

of Information Act (“FOIA”).<sup>78</sup> First, Defendants argue that Verizon’s Brand Identity Standards manual, a significant financial asset, is confidential because it sets forth Verizon’s confidential brand strategies and the tools to build the identity of the Verizon brand following that strategy.<sup>79</sup> Second, Defendants claim that the corporate identity standards for Verizon Wireless are treated as proprietary and confidential to protect the integrity, value and goodwill of the Verizon Wireless brand, and such manuals are only released to entities that have a business relationship with Verizon that require the use of the Verizon Wireless logo.<sup>80</sup> According to Defendants, this control limits unauthorized use of the logo that could potentially damage the reputation of the company.<sup>81</sup> Because we conclude that Defendants have sufficiently demonstrated that Exhibits A-C of Defendants’ Response to Complainants First and Second Set of Interrogatories meet the disclosure exemption, we direct Complainants to return Exhibits A-C in accordance with the procedure set forth in section 1.731(e) of the Commission’s rules.<sup>82</sup>

## VI. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, and 208, and the authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that the above-captioned complaint IS GRANTED IN PART to the extent described herein and is otherwise DENIED and DISMISSED WITH PREJUDICE, and that this proceeding is TERMINATED.

32. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and the authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that Verizon Communications Inc., et al.’s Motion to Dismiss filed on May 26, 2005 IS DENIED.

33. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and the authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that Consumer.net et al.’s Motion to Strike IS DENIED.

34. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and the authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that Consumer.net et al.’s Motion to Request Commission’s Adjudication IS DENIED.

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<sup>78</sup> 5 U.S.C. § 552(b)(4).

<sup>79</sup> See Letter from Joshua S. Turner, Counsel to the Verizon Defendants, Wiley Rein & Fielding, to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau (August 3, 2005).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See 47 C.F.R. § 1.731(e).

35. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Verizon Communications Inc. et al.'s request for confidential treatment as stated herein IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison  
Chief, Enforcement Bureau